APPENDIX A — DECISION AND ORDER OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT, DATED AND ENTERED SEPTEMBER 7, 2000

SUPREME COURT, APPELLATE DIVISION
First Department, February 2000

Milton L. Williams, J.P.,
Peter Tom
Alfred D. Lerner
Richard T. Andrias
David Friedman, JJ.

Sage Realty Corporation, et al.,

Plaintiffs-Appellants,

-against-

Proskauer Rose LLP, et al.,

Defendants-Respondents.

Plaintiffs appeal from an order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 17, 2000, which, to the extent appealed from, granted the motion of defendants to dismiss the complaint.

* * *

Appendix A

TOM, J.

The issue before us is whether plaintiffs intentionally and in bad faith destroyed tape recordings relevant to their claims and, if so, what is the proper remedy for plaintiffs' spoliation of evidence.

Defendant Proskauer was legal counsel for Robert and Melvyn Kaufman in connection with a complex mortgage-backed securities transaction. The Kaufman brothers were principals of plaintiff Sage Realty Corporation and various related real estate entities that are parties to the present action. Defendant Nomura Securities International ("NSI") acted as broker-dealer and Proskauer acted as the plaintiffs' legal advisor. The purpose of the transaction was to refinance certain real estate holdings and to thus acquire new equity capital. The loan portion of the transaction closed on February 9, 1995; the securitization portion of the transaction took place on April 4, 1995. Plaintiffs contend that their goal was to enter into only leasehold, and not fee, mortgages.

In 1996, plaintiffs discharged Proskauer. The discharge led to some initial litigation over Proskauer's retention of its work product documentation (*Sage Realty Corp. v Proskauer Rose LLP.*, 91 NY2d 30), and plaintiffs hired Nixon Peabody. Plaintiffs then sued Proskauer and NSI in the present case, asserting claims sounding in legal malpractice, breach of fiduciary duty and breach of contract, in connection with the terms of the transaction. Generally, plaintiffs, experienced real estate businessmen, contended that defendants had failed to explain numerous loan documents to plaintiffs, failed to ensure that only leasehold mortgages were created, failed to

ensure that the defeasance provisions of the transaction worked as intended, and generally failed to advise, and that Proskauer failed to reveal a putative conflict in that it had represented NSI in another matter. Defendants, though, claim that the fee mortgage and defeasance matters were amply discussed in many conversations with plaintiffs' principals, who were advised of all relevant aspects of the transaction.

Defendants' initial motion for summary judgment was denied pending further discovery. During discovery, defendants demanded production of the tape recordings that are presently in issue. The Kaufmans concede, as they must, that they and other senior executives tape recorded business discussions with other parties, including their counsel, regarding complex or important matters, with the result that hundreds of tapes were stored in Melvyn Kaufman's office. Among those recordings were tapes pertaining to discussions with defendants regarding this transaction. Obviously, to the extent that defendants' advice to plaintiffs was thus memorialized on tape, that advice has critical importance to the basic thrust of plaintiffs' entire complaint that the necessary advice was not imparted. Apparently, though, plaintiffs were less than willing to release the tapes.

When plaintiffs received the demands during April and May 1999, their first response was that compliance would be unduly burdensome, but that they would try to locate "any non-privileged, relevant recordings of telephone or other conversations specifically responsive to [the] demand." Defendants subsequently had to demand the tapes again, and plaintiffs again responded that they were trying to locate them. During a one-week period at the end of June 1999, on

the eve of depositions, three batches of tapes were produced totaling 13 tapes (eventually two more were produced) encompassing 16 conversations. With the exception of one tape, these conversations did not allude to the fee mortgage or defeasance issues that were being litigated, and as to that one, as the IAS court indicated, Melvyn Kaufman seemed surprised that it even existed. Three tapes recorded conversations with Proskauer employees and two contained conversations with NSI employees. Yet defendants claimed to have had numerous other conversations with plaintiffs. When defendants requested further tapes, plaintiffs' counsel responded that they were not aware of any more.

As a result, Proskauer refused to produce its first witness for depositions. Defendants moved to compel production of all relevant tape recordings, and plaintiffs cross-moved to compel Proskauer to produce purportedly missing work product files. In connection with the motions, Melvyn Kaufman submitted an affidavit averring his familiarity with the legal requirement that relevant evidence may not be destroyed or altered in anticipation of litigation, that plaintiffs and their employees had "extensively, thoroughly and diligently" searched for, and located, over several weeks "all available tape recordings and transcriptions of tape recordings sought by the defendants to be produced to them," and that all tapes had been turned over to counsel. Kaufman also averred that "[t]o the best of my knowledge, no such tape recordings or transcripts were so destroyed or altered. Also, I am not aware of any requested tape recorded conversation not located and produced . . . and therefore, I do not believe any tape was even inadvertently discarded or altered." The IAS court then directed depositions on the issue whether tapes were altered or destroyed.

Appendix A

After initially failing to respond to interrogatories as to the taping process and who would be knowledgeable, plaintiffs, under court order, provided a very short list of individual names - five besides the Kaufmans. However, they omitted the names of former personnel who had been primarily responsible for filing and maintaining the tapes. The court then ordered a more complete answer, so that plaintiffs now supplied a very long list of names - 159 - of personnel who might know something, but omitted any description of how each individual might have been involved in recording or filing tapes, or how they could be located, insofar as all addresses and phone numbers were also omitted. At the depositions, plaintiffs' witnesses were directed by counsel not to answer questions regarding whether certain conversations were taped. The dodging and weaving by now was blatant.

Several former employees provided testimony on this issue significantly at variance with plaintiffs' position and especially undermining key aspects of Kaufman's affidavit. Former personnel established that the protocol was to tape all conversations, including telephone conversations. Although one witness described the taping as selective rather than routine, that person recalled that Melvyn had had phone conversations regarding the securitization transaction. Another former employee recalled witnessing Melvyn having numerous phone conversations regarding that transaction, during which the mortgage of fee interests was discussed, and that she had listened to a dozen, or perhaps fewer, tapes relating to those conversations. Melvyn Kaufman's secretary testified that she had taped "several" conversations on a daily basis during the relevant time period, and that from 1994 to

1996, covering the time period of Proskauer's representation of plaintiffs giving rise to the underlying dispute, 3 or 4 file cabinets, each holding about 100 tapes with more piled on top, were located in Kaufman's office; some of these were Proskauer tapes. To her knowledge, none had been discarded when she left that employment. However, another employee recalled that several tapes were disposed of during the summer of 1999 - the coincidence of the timing is, of course, remarkable.

Melvyn Kaufman also was deposed. He admitted extensive taping over a ten-year period, ostensibly as a memory device for him and his brother, and that he intended that all conversations regarding the securitization transaction be recorded. He also admitted that the defeasance provisions, and that the fee not be mortgaged, were of paramount importance, but testified that, nonetheless, only one tape was produced and as to that one, "I don't even know where the hell that came from . . .". He claimed that all such conversations occurred in person, rather than by telephone, and that they were not recorded. He repeated that all relevant tapes were produced and none were destroyed. His "diligent" and "thorough" search took five minutes; he, not counsel, preliminarily determined what was relevant, which is somewhat at variance with his averment that all tapes were provided to counsel. With regard to the important claim in his affidavit regarding preservation of evidence, Kaufman initially testified that he probably had destroyed tapes, some probably relating to the securitization transaction, in 1995 as part of a general housecleaning, but that no tapes were destroyed during the summer of 1999. However, when presented with some of the above noted employee testimony, he admitted going

through and discarding many tapes during June 1999 "within a day or two" after sending some tapes to his attorney in response to the discovery demand. About 20 tapes were brought home before being destroyed so that no one could recover them from the office trash. However, he reiterated that these tapes were not relevant to the discovery demand, although he also admitted that no one but him listened to the tapes to establish their contents and relevancy. Nor did plaintiffs seek a protective order or other judicial intervention to isolate only relevant material for purposes of discovery.

On the basis of this testimony, defendants moved to dismiss the complaint insofar as they were severely prejudiced by plaintiffs' spoliation of relevant evidence. In opposition, plaintiffs argued the lack of relevance and, ironically, relied on the absence of evidence that the tapes were relevant. The IAS court granted defendants' motion, except for the conflict claim that we do not presently reach, and granted defendants' attorneys' fees request. In reaching its conclusion, the IAS court relied on the uncontroverted evidence noted above, including Kaufman's own testimony, and his admitted conduct of destroying numerous tapes at such a critical point in time without even advising his attorney of such destruction of potential evidence to ascertain its evidentiary value and hence whether the tapes were within the scope of pending discovery orders. This conduct, while not of itself dispositive on the narrow issue of relevance, nevertheless was so highly dubious as to cast doubt on Kaufman's protestations that all relevant information had been disclosed. As a result, the IAS court rejected plaintiffs' contention that defendants had failed to come forward with adequate evidence establishing that the destroyed evidence, in fact, was relevant to the underlying

litigation, a burden rendered impossible to satisfy as a result of plaintiffs' own misconduct.

Whether we review on the basis of the common-law doctrine of spoliation, allowing dismissal when key evidence is destroyed prior to examination by the opposing party, in which case willfulness or bad faith may not be necessary predicates (*see, Squitieri v City of New York*, 248 AD2d 201), or on a proper exercise of the court's discretion under CPLR 3126, addressing willful conduct by a nondisclosing party, we agree with the disposition of the IAS court.

Plaintiffs' main defense to dismissal, in fact to the imposition of any sanctions, is the conclusory claim that the tapes were not relevant to the underlying action and, as such, were not discoverable in the first place. The sheer effrontery of this claim, in view of Kaufman's intentional act of destroying the tapes once disclosure became imminent, is amazing. The likely relevance of the destroyed evidence is easily inferred. Basically uncontroverted evidence established that plaintiffs, as a matter of their own policy, taped important business conversations; plaintiffs admitted that the nature of the loan was crucial to the transaction; evidence established that plaintiffs directed that all phone calls in connection with this transaction be recorded or otherwise memorialized; and that Melvyn Kaufman was observed discussing these very matters with defendants on the telephone. Although plaintiffs now complain that relevance cannot be established in the absence of the tapes, it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly, so that plaintiffs' objection will not, under these circum-

stances, impede a finding of relevance (*Sonmez v World on Columbus*, 261 AD2d 199; *Marrocco v General Motors Corp.*, 966 F 2d 220, 223).

We also conclude that the destruction of the tapes was done in bad faith, an inference also circumstantially supported by the nature of Kaufman's conduct and the timing (CPLR 3126; *Sonmez v World on Columbus, supra; cf., Christian v City of New York*, __ AD2d __, 703 NYS2d 5). Again, the record clearly supports this conclusion. Evidence by former employees established that "hundreds" of tapes were present in his office when this litigation commenced, and that they no longer existed during the time period the discovery dispute was occurring. Kaufman himself admitted taking home several tapes with the expressed intention of destroying them. This indication of bad faith is buttressed by Kaufman's failure to take even the elementary precaution, knowing that tapes were being sought, of delivering the tapes to counsel or having a third party verify their lack of relevance prior to their destruction. This record also clearly indicates that, given the singularity of this evidence (*see, DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41), defendants are substantially prejudiced in interposing a defense without it.

CPLR 3126 provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just . . .". As such, courts have "broad discretion" that must not be disturbed absent "clear abuse" to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an

adversary's inspection (*Puccia v Farley*, 261 AD2d 83, 85; *cf., Hill v Douglas Elliman-Gibbons & Ives*, 256 AD2d 31 *lv. granted* 1999 NY App Div LEXIS 5200). We have recognized that under such circumstances, dismissal may be appropriate as a matter of "elemental fairness" (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 175), especially when the destruction of the evidence is "reprehensible" (*Hyosung [America] v Woodcrest Fabrics*, 106 AD2d 298, *appeal dismissed* 64 AD2d 934). Although we also have recognized that dismissal may be an excessive remedy where the destroyed evidence is not crucial, with prejudice diminished accordingly (*Atlantic Mutual Insurance Co. v Sea Transfer Trucking*, 264 AD2d 659), and other courts have not dismissed when evidence was discarded in good faith, pursuant to normal business practices and in the absence of pending litigation or notice of a specific claim (*Conderman v Rochester Gas & Electric Corp.*, 262 AD2d 1068, 1070), those factors are inapplicable in this case. Rather, dismissal is justified by the deliberate nature of the conduct that effectively impede the ability of the deprived party to assert a claim or a defense (*Hyosung, supra*; David Siegel, Practice Comm., McKinney's Cons. Laws of NY, Book 7B, CPLR 3126:7, pp. 757-758; 6 Weinstein-Korn-Miller, NY Civil Practice, ¶ 3126.04).

Plaintiffs also complain that the IAS court misapplied the burden of proof. Although the party seeking disclosure has the burden to show willfulness by the non-disclosing party, the latter must demonstrate an excuse for its failure to disclose (*Kami & Sons v Pipe*, 248 AD2d 312; *Van Wert v Green-Pepper*, 151 AD2d 839, 841). Plaintiffs contend that defendants fail to prove their willfulness, and that their excuse

adequately satisfies their own responsibility in this regard. Those claims, though, do not comport with the above facts. The excuse, such as it is, is entirely conclusory and even seems contrived to frustrate the discovery request and orders. It was properly rejected by the motion court.

Accordingly, the order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 17, 2000, which, to the extent appealed from, granted the motion of defendants Proskauer Rose LLP and Nomura Securities International, Inc. to dismiss the complaint pursuant to CPLR 3126, with the exception of plaintiffs' conflict of interests claims against Proskauer, should be affirmed, with costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: SEPTEMBER 7, 2000

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED FEBRUARY 9, 2000 AND FILED FEBRUARY 17, 2000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IAS PART 13

INDEX NO. 119772/96

Sage Realty Corporation, et al.,

Plaintiffs,

-against-

Proskauer Rose LLP, et al.,

Defendants.

SHEILA ABDUS - SALAAM, J.:

In this legal malpractice action arising out of a complex real estate transaction in which defendant Proskauer Rose LLP ("Proskauer") was plaintiffs' legal counsel, and defendant Nomura Securities International, Inc. ("Nomura") provided financial advisory services with respect to the structuring of a securitized mortgage transaction, both defendants have moved for an order dismissing the complaint based upon spoliation of evidence.

At issue here is plaintiff Melvyn Kaufman's admitted destruction of tape recordings of telephone conversations after defendants had served a discovery demand for all

recordings pertaining to this transaction, and after plaintiffs had produced 15 tapes[1] in response to that demand. While plaintiffs argue here that the tapes that were destroyed did not relate in any way to the subject of this lawsuit, defendants assert that the circumstances surrounding the destruction of those tapes demonstrate that the tapes were not only relevant but damaging to plaintiffs' case, and that their destruction constitutes willful, bad faith spoliation of evidence which mandates dismissal of the complaint.

Extensive discovery has already been conducted with respect to the spoliation issue. This motion has been fully briefed and argued by all parties. The court has been provided with transcripts of the depositions, as well as videotapes of some depositions, including the one of Melvyn Kaufman. The voluminous papers have been fully reviewed by this court, and Mr. Kaufman's videotaped deposition has been viewed as well.

While it is not entirely clear how many telephone conversations related to the transaction were taped (plaintiffs claim there were only 10 to 20 such tapes while defendants claim there were more than 30), and exactly when such tapes were destroyed, the following is uncontroverted:

1) According to plaintiff Melvyn Kaufman, he, his brother Robert Kaufman and a few senior executives had a practice

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1. These 15 tapes included 16 conversations. In addition plaintiffs produced transcripts of three conversations for a total of 19 recorded conversations. However, as defendants point out only three of those conversations were with Proskauer (one of which occurred after the transaction's closing date of February 8, 1995) and only two were with Nomura.

of tape recording telephone conversations which they believed contained complex or important business information;

2) As of the date that this litigation commenced, Melvyn Kaufman had hundreds of recordings stored in his office, some of which related to the transaction here;

3) Defendants each served a discovery demand — Proskauer's demand is dated April 26, 1999 and Nomura's demand is dated May 17, 1999, — requiring production of all tape recordings of telephone conversations relating to the merits of this lawsuit;

4) In response to the demands, Kaufman produced 15 tape recordings by supplying them to his counsel to be forwarded to defense counsel;

5) Within a day or two after producing the 15 tapes, Melvyn Kaufman threw some tapes in a wastepaper basket in his office and then took approximately 20 more tapes home, where he threw them down the trash chute. When asked by defendant Proskauer at his September 1999 deposition why he had thrown out the tapes, he stated, *inter alia*, that he was "fed up" with tapes being an issue. His explanation for taking the tapes home to discard them was that he "didn't want anybody to see a bundle of tapes which look like music tapes to touch them. So [he] threw them down the chute in [his] apartment house where nobody sees anything" to make sure that they were totally destroyed and "unrecognized";

6) Subsequent to discarding the tapes, Melvyn Kaufman wrote a letter to Proskauer partner Arnold Levine in which he stated, *inter alia*, that ". . . we have sent to you innumerable personal internal conversations, most of which were useless for any purpose except for its [sic] basic purpose which is for my brother to hear what I had to say or for me to hear what he had say [sic] in reference to a phone call."

"It would be sad if this ridiculous posture that your firm's counsel has taken which has *forced us to discontinue the retention of these recordings* so that we will be back one hundred years, where he said you said I said she said." (emphasis supplied);

7) When questioned at his deposition as to whether Proskauer had discussed with plaintiffs, over the telephone, issues relating to the substitution of collateral, Melvyn Kaufman responded as follows: "The only one that gets close to it I think you have but it really doesn't do the job because its [sic] only a beginning start and that was with — oh, your tax counsel here — Ira Akselrad. I think you have that. I think they have that. *I don't even know where the hell that came from* but go ahead." (emphasis supplied).

In considering all of the above, the court recognizes that there is testimony indicating that plaintiffs discarded tape recordings both before this litigation was commenced and before defendants demanded production of relevant recordings. However, the circumstances of Melvyn Kaufman taking tapes home with him and destroying them without even letting his attorneys listen to them on the heels of his selecting other tapes to give to his counsel to produce; his

statement in his letter to Proskauer that it had forced him to discontinue the retention of recordings after defendants' demand for *relevant* recordings; his apparent surprise at his deposition that he had produced *any* recording which related to the issue of substitution of collateral (a central issue in this case); and the no-less-than three different, inconsistent and incredible explanations for when and how he disposed of tapes (which can only be described as a valiant attempt by his attorneys at damage control for Mr. Kaufman's misconduct), considered together, lead this court to draw a "negative inference" (see *DiDomenico v C&S Aeromatick Supplies, Inc.*, 252 AD2d 41, 52, and cases cited therein) and persuade this court that there has been a willful and bad faith destruction of discovery material that ought to have been disclosed (CPLR 3126; see *Sonmez v World on Columbus Inc.*, 261 AD2d 199; *Acolyte Elec. Corp. v City of New York*, 165 AD2d 802; *Anteri v NRS Constr. Corp.*, 117 AD2d 696).

In *Sonmez, supra*, the Appellate Division, First Department addressed precisely this issue of the deliberate destruction of evidence — there, financial records crucial to the defense of the action — and affirmed the dismissal of the plaintiffs' complaint pursuant to CPLR 3126. In response to plaintiffs' argument that defendants had not demonstrated that the documents were relevant to the issues in the case, the Court held that "[p]laintiffs were not entitled to a fact-finding hearing to determine the nature of the documents they wrongfully discarded" (261 AD2d 199).

Like the plaintiffs in *Sonmez, supra*, plaintiffs here argue that defendants have not shown that the tapes Melvyn Kaufman destroyed are relevant to the transaction at issue.

They assert that defendants must demonstrate by direct evidence that the conversations existed and that they were recorded. As one court has recognized in similar circumstances, such proof is impossible:

> We find it ironic that the plaintiffs . . . contend that GM has not adequately explained what [the destroyed evidence] would have shown, for it was the plaintiffs' own misconduct which prevented GM from acquiring that very information. Perhaps that evidence was an irreplaceable part of GM's defense. . . . Then again, perhaps not. But therein lies the prejudice — GM was denied any opportunity to find out one way or the other.

Marrocco v. General Motors Corp., 966 F2d 220, 223 (7th Cir. 1992).

While defendants cannot prove with certainty that the destroyed tapes contained evidence crucial to their defense, or would have led them to uncover proof to establish their defense, such certitude is not possible here, where the tapes no longer exist due to plaintiffs' wrongdoing. The core of the Kaufmans' claim against defendants is that they consistently told defendants that they were unwilling to mortgage fee interests in the properties in order to complete the transaction, and that they were never told that fee mortgages would be required. Plaintiffs also claim that they were not properly advised concerning the defeasance provisions of the loan documents.

Appendix B

In response to defendant Proskauer's earlier motion for summary judgment, and Proskauer's assertion that plaintiffs could not defeat summary judgment because the documentary evidence demonstrates that plaintiffs knew about the mortgaging of the fee interests and the defeasance provisions, plaintiffs argued that the transaction documents and drafts were too numerous and complex for plaintiffs to understand, and that is why plaintiffs relied upon Proskauer. For its part, Proskauer maintained (as it does now) that it had hundreds of conversations with the Kaufmans concerning the fees and the defeasance provisions. Thus, a central element of proof in this case, for all parties, is the parties' conversations and the understandings reached in those conversations. It is not only what was said but the response to what was said that is key. In essence, one of the basic issues of this case is, to paraphrase Sen. Howard Baker in a statement that he made during the Watergate hearings,: What did Melvyn Kaufman know, and when did he know it ?.[2]

In determining the sanction to be imposed upon plaintiffs for what I have concluded was willful and bad faith destruction of discoverable material, I have taken into account that we will now never know what was on the tape recordings that have been destroyed. A preclusion order, which prevents plaintiffs from testifying as to telephone conversations that were had with defendants, or an adverse inference or missing documents charge given at trial are remedies which do not appear to me to be appropriate here, at least not with respect

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2. "What did the President know, and when did he know it?" Howard H. Baker, Jr., quoted in Sam J. Ervin, Jr. *The Whole Truth: The Watergate Conspiracy* 174 (1980) (The Oxford Dictionary of American Legal Quotations, 1993).

to the main aspects of plaintiffs' claims, i.e., the mortgaging of fees and the defeasance provisions. Anything short of dismissal of plaintiffs' complaint (except with respect to the conflict of interest claim) might serve to provide plaintiffs with an unfair advantage in this litigation for what I have determined to be a bad faith destruction of evidence and would put a judicial imprimatur on such conduct (see *DiDomenico v C & S Aeromatick Supplies, Inc.*, 252 AD2d 41, 49 [penalties imposed under CPLR 3126 are designed to "prevent a party who has refused to disclose evidence from affirmatively exploiting . . . the unavailability of the proof"]).

As to plaintiffs' claim that Proskauer engaged in a conflict of interest in representing Nomura at the same time it was representing plaintiffs, the record reveals that even if a tape recording of the conversation between Melvyn Kaufman and Proskauer partner Herbert Weinstein existed during which the alleged conflict of interest was discussed, it would not be crucial either to plaintiffs' prosecution or Proskauer's defense of that claim. In his affidavit dated June 26, 1998 Weinstein, since deceased, avers that:

> By November 3, 1994, I telephoned Melvyn Kaufman to obtain a conflict waiver. I told him that Proskauer represented Nomura in labor/employment and immigration matters. His response, delivered in a tone suggesting that he considered the issue trivial, was in substance, "so what?" I asked Mr. Kaufman whether he wanted Proskauer to continue representing plaintiffs, and told him that I needed to clear the conflict. He responded that it was no problem.

Thus, by his own admission, Weinstein did not tell Kaufman about Proskauer's representation of Nomura on securities matters, and any conflict that may have existed with respect to such matters could not have been waived by Kaufman during that phone call. Thus, as the tape recordings do not impact upon plaintiffs' conflict of interest claim, that portion of the complaint will not be dismissed.

As a result of plaintiffs' willful destruction of evidence, defendants are awarded attorneys' fees for this motion. This matter is referred to a Special Referee to hear and report with respect to the reasonable amount of such fees.

ORDERED that the Clerk enter judgment dismissing the complaint as against defendant Nomura Securities International, Inc.; and it is further

ORDERED that the complaint as against the remaining defendants is dismissed except with respect to the conflict of interest allegations of the complaint.

Dated: February 9, 2000 ENTER

s/ SA-S
J.S.C.

APPENDIX C — DECISION AND ORDER OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT, DATED JUNE 21, 2001

Rosenberger, J.P., Williams, Tom, Andrias, Marlow, JJ.

4586

Frank H. Penski

Sage Realty Corporation, et al.,

Plaintiffs-Appellants,

-against-

Leon P. Gold

Proskauer Rose LLP,

Defendant-Respondent,

-and-

Nomura Securities International, Inc.

Defendant.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 8, 2001, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In their remaining cause of action for legal malpractice, plaintiffs allege that defendant represented them while laboring under a conflict of interest. Plaintiffs have, however,

failed to offer any proof of damages attributable to the alleged malpractice independent of their claim previously dismissed by reason of their bad faith destruction of evidence (*see, Sage Realty Corp. v. Proskauer Rose LLP*, 275 AD2d 11, 12). Accordingly, the motion court properly dismissed the complaint since plaintiffs were unable to establish a prima facie cause of action for legal malpractice (*see, Matter of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: JUNE 21, 2001

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED JANUARY 29, 2001

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13
Justice

INDEX NO. 119772/96
MOTION DATE 11/20/00
MOTION SEQ. NO. 025
MOTION CAL. NO. 156

Sage Realty Corporation, The William Kaufman Organization, Ltd., 4 Third Avenue Fee LLC, Water Street Fee LLC, 7 Third Avenue Fee LLC, 7 Third Avenue Leasehold LLC, Water Street Leasehold LLC, Melvyn Kaufman and Robert Kaufman

-v-

Proskauer Rose LLP

* * *

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment dismissing the verified second amended complaint in its entirety is granted.

In my decision dated February 9, 2000 (affirmed 275 AD2d 11), the complaint was dismissed with the exception of the conflict of interest claim. That dismissal was based upon my determination that plaintiffs had engaged in willful and bad faith destruction of discoverable tape recordings. In

deciding to permit the conflict of interest claim to continue (the pertinent allegations are included in the "parties" portion of the complaint and in the first cause of action labeled "legal malpractice"), I reasoned that even if a tape recording of the conversation between Melvyn Kaufman and Proskauer partner Herbert Weinstein existed during which the alleged conflict of interest was discussed, it would not be crucial to either the prosecution or defense of the conflict of interest claim.

By this summary judgment motion, defendant has demonstrated that the remaining claim should be dismissed because the damages that plaintiffs seek to recover based upon the alleged conflict of interest — compensatory damages and disgorgement of legal fees — are the same damages that were sought to be recovered in the now dismissed legal malpractice claim. As defendant points out, plaintiffs have previously argued to this court, in opposition to defendant's earlier motion for summary judgment, that the conflict of interest claim is inextricably intertwined with the legal malpractice claim. In their memorandum of law opposing that motion, plaintiffs persuasively asserted as follows:

> Proskauer's argument that plaintiffs did not suffer any injury from these conflicts is nothing short of absurd. It is now patently clear that Proskauer did not bother for its own reasons (most likely its lucrative work from NACC and NSI) to explain the key provisions of the loan documents to the Kaufmans *before* closing. As a result, the plaintiffs are stuck in a deal they would never have agreed to had competent, responsible and loyal counsel represented them. The terms of

> the deal Proskauer negotiated for the Kaufmans with its own client, Nomura, have caused plaintiffs extensive and immediate financial injury. [Defendant's Motion, Ex. C]

This explanation by plaintiffs, offered years ago in opposition to a summary judgment motion, provides the rationale for why their conflict of interest claim must now be dismissed, for that claim is grounded upon and linked to the contention that Proskauer did not explain to plaintiffs the key elements of the transaction. Plaintiffs have contended that their damages from the conflict of interest claim consist of being "stuck" in a deal that they would never have agreed to had they been represented by loyal counsel. I dismissed the legal malpractice claim due to plaintiffs' bad faith spoliation of discoverable evidence, noting that a central issue was what Melvyn Kaufman knew, and when he knew it. In reviewing that dismissal, the First Department described plaintiffs' conduct during the spoliation discovery as "blatant" "dodging and weaving" (275 AD2d 11, 713 NYS2d 155, 158). If I were to permit plaintiffs to pursue their claim for damages based upon the alleged conflict of interest, they would effectively be dodging the impact of their bad faith spoliation, and doing an end-run around my prior determination, which has been affirmed. Such a result is not appropriate, as it would be incongruent with the prior findings regarding the proper penalty for willful spoliation of evidence.

Finally, I would also note that plaintiffs' "dodging and weaving" did not end even after I determined that the majority of their complaint should be dismissed due to spoliation. In October 2000, approximately 1½ years after defendant demanded production of all tapes relevant to this lawsuit,

plaintiffs delivered to defendant eighty pages of previously undisclosed tape transcripts concerning what was eventually to be the May 2000 defeasance. According to plaintiffs' counsel, as set forth in his October 31, 2000 letter to defendant, the transcripts were discovered during the course of counsel's review of defeasance documents, and as of that date, plaintiffs had been unable to locate the tapes. Those transcripts were of conversations that took place in March, April and May 1999, after this action was commenced, and around the time that defendant demanded production of the tapes. And yet, as previously noted, plaintiff Melvyn Kaufman has maintained during the course of this litigation that all relevant tapes were produced and none destroyed!

This complex lawsuit, which has been vigorously litigated, and which raises serious allegations of counsel's conflict of interest, will not conclude with a determination on the merits. To the extent that there ever was any substance to the claims asserted by plaintiffs here, it is their actions alone which have brought about the end to this litigation without a trial on the merits. Based upon all of the foregoing, defendant has demonstrated that summary judgment should be granted dismissing the remainder of the complaint.

ORDERED that the Clerk enter judgment dismissing the complaint.

Dated 1/29/01

ENTER: s/ SA-S
J.S.C.

Check one: ☒ FINAL DISPOSITION
☐ NON-FINAL DISPOSITION

APPENDIX E — DECISION AND ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS, DATED SEPTEMBER 6, 2001

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of September 2001

Present, HON. GEORGE BUNDY SMITH,
Senior Associate Judge, presiding.

1-10 Mo. No. 638

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix E

STATE OF NEW YORK,
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION September 6, 2001

1-10 Mo. No. 638

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP et al.,

Respondents.

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Chief Judge Kaye took no part.

APPENDIX F — DECISION AND ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS, DATED JANUARY 10, 2002

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of January 2002

Present, HON. GEORGE BUNDY SMITH,
Senior Associate Judge, presiding.

1-14 Mo. No. 1319

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court